

**89-1355**

No.

Supreme Court of U.S.  
ILLINOIS  
FEB 20 1990  
JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1989

**DONALD BAUM, Individually, and as Executor of the  
Estate of BEVERLY BAUM, Deceased, and LESLIE  
B. BUENROSTRO, and DEBORAH B. SMITH, Individually,**

*Petitioners,*

v.

**JOHN B. EGAN and MARY EGAN,**

*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI  
TO THE APPELLATE COURT OF  
ILLINOIS, FIRST JUDICIAL DISTRICT**

GEORGE M. ELSENER  
Counsel of Record  
GEORGE M. ELSENER & ASSOCIATES  
180 North LaSalle Street  
Suite 1125  
Chicago, Illinois 60601-2601  
(312) 726-8125

*Attorneys for Petitioners*



**QUESTION PRESENTED**

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Does the Illinois Dram Shop act violate the United States and Illinois Constitutions by precluding recovery for the loss of love, society and companionship of a spouse whose death is caused by over-serving alcohol to a drunk driver, where such recovery is permitted under Illinois common law for the otherwise wrongful death of a spouse.

**PARTIES TO THE PROCEEDINGS  
AND RULE 29.4(C) STATEMENT**

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Petitioners, who were plaintiffs and appellants in the courts below, are DONALD BAUM, Individually, and as the Executor of the Estate of BEVERLY BAUM, Deceased, and LESLIE B. BUENROSTRO, and DEBORAH B. SMITH, Individually.

Respondents, JOHN B. EGAN and MARY EGAN, were the defendants in the Trial Court and appellees in the Appellate Court.

The Attorney General of the State of Illinois has not appeared in these proceedings, but has been served with this petition pursuant to 28 U.S.C. Section 2403(b) and Rule 29.4(c).

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**DONALD BAUM, Individually, and as Executor of the  
Estate of BEVERLY BAUM, Deceased, and LESLIE  
B. BUENROSTRO, and DEBORAH B. SMITH, Individually,**  
*Petitioners,*

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**JOHN B. EGAN and MARY EGAN,**  
*Respondents.*

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**PETITION FOR A WRIT OF CERTIORARI  
TO THE APPELLATE COURT OF  
ILLINOIS, FIRST JUDICIAL DISTRICT**

---

Now COME the Petitioners, DONALD BAUM, and as Executor of the Estate of BEVERLY BAUM, Deceased, and LESLIE B. BUENROSTRO, and DEBORAH B. SMITH, Individually, by their attorneys, GEORGE M. ELSENER & ASSOCIATES, respectfully Petition for Writ of Certiorari to the Appellate Court of Illinois, First District in this case.

**STATEMENT OF JURISDICTION**

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The judgment of the Appellate Court of Illinois, First Judicial District, Fourth Division was entered in favor of Defendants-Respondents on June 22, 1989. The Supreme

Court of Illinois denied Plaintiffs-Petitioners' Petition for Leave to Appeal on October 5, 1989.

On November 21, 1989 the Supreme Court of Illinois denied Plaintiffs-Petitioners Motion for Leave to File a Motion for Reconsideration of the Order Denying Petition for Leave to Appeal and granted the motion of Plaintiffs-Petitioners to stay the mandate of the Supreme Court of Illinois pending application for *certiorari* in the United States Supreme Court.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and 28 U.S.C. Section 1257(a).

## **CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED**

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### **Constitution of the United States of America**

#### **Amendment VII**

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

#### **Amendment XIV**

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## **Constitution of the State of Illinois**

### **Article I, Section 2**

No person shall be deprived of life, liberty or property without due process of law nor be denied of the equal protection of the laws.

### **Article 1, Section 13**

The right of trial by jury as heretofore enjoyed shall remain inviolate.

## **Illinois Revised Statutes**

### **III. Rev. Stat. ch. 1, para. 1004 (1983)**

Words importing the singular number may extend and be applied to several persons or things, and words importing the plural number may include the singular.

### **III. Rev. Stat. ch. 43, para. 94 (1983)**

[The Liquor Control Act of 1934] shall be liberally construed, to the end that the health, safety and welfare of the People of the State of Illinois shall be protected and temperance in the consumption of alcoholic liquors shall be fostered and promoted by sound and careful control and regulation of the manufacture, sale and distribution of alcoholic liquors.

### **III. Rev. Stat. ch. 43, para. 131 (1983)**

The sale to and possession of alcoholic liquor by persons under 21, intoxicated persons, persons under legal disability or in need of mental treatment—Proof of identity and age—Gatherings where one or more persons are under 18—Violations and penalties—Renting hotel or motel rooms.

**III. Rev. Stat. ch. 43, para. 135 (1983)**

Actions for damages caused by intoxication—Lessor's liability—Forfeiture of lease—Maximum recovery of a \$20,000 limit to actions arising before 9-12-85, per amendment of 1-1-86; date of death here is 4-14-84—Limitations—Jurisdiction—Service.

**STATEMENT OF THE CASE**

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**Statement Of Facts**

Defendants, John and Mary Egan, owned and operated a tavern and dram shop known as "Egan's Tap". Daniel Liston drank alcohol at the Defendants tavern and dram shop on 4-14-84. Egan knew Daniel Liston. Liston's habit of drinking to the state of intoxication and Liston's hospitalization for alcoholism were also known to Egan.

On 4-14-84 Egan gave or sold alcohol to Liston who obviously became intoxicated. As a tavern keeper, Egan has a duty to prevent intoxicated persons from dispatching in vehicles from his property. Egan knew of the risks of drunk driving. Defendant Egan knew that Liston's blood alcohol level exceeded the legal limit and possessed the knowledge that Liston would be driving a truck in an intoxicated condition which would increase harm to others on the highway. Egan was insured for \$100,000.

After leaving "Egan's Tap" on 4-14-84, Daniel Liston drove across the centerline and collided with an automobile driven by Beverly Baum. In this collision Beverly Baum was injured and killed.

Plaintiffs' complaint disavowed any lost wages because Beverly Baum was a housewife not employed outside her

home. A probate estate was opened. Mrs. Baum left surviving her husband and two married daughters, who each claim damages for their respective loss of love, society and companionship in the amount of \$100,000.

#### **Nature Of Action**

In Petitioner's First Amended Complaint, filed on 4-9-85, Count V sought recovery for the loss of love, society and companionship of BEVERLY BAUM, under the Illinois Dram Shop act, Ill. Rev. Stat. ch. 43, para. 135 (1983). Counts VI, VII and VIII plead "common law dram shop actions" which also sought recovery for the loss of love, society and companionship of BEVERLY BAUM.

Respondents moved for summary judgment on Count V of the First Amended Complaint, on grounds that the Illinois Dram Shop act does not permit recovery for loss of love, society, and companionship. Ill. Rev. Stat. ch. 43, para. 135 (1983). Respondents also moved to dismiss Counts VI, VII and VIII on grounds that recovery under the Illinois Dram Shop act is the exclusive remedy against tavern operators and owners who serve persons, who by reason of their intoxication cause injury or death to another.

On 6-26-86, the trial court denied the motion for summary on Count V, but sustained the motion to dismiss Counts VI, VII and VIII. Subsequently, on 3-17-88 the trial court reversed its ruling on the summary judgment motion as to Count V of the first amended complaint. This order was made final and appealable on 5-6-88. The effect of the order granting summary judgment was that all counts against the respondents were eliminated. A timely Notice of Appeal was filed on 6-1-88. On 7-25-88 the order dismissing Counts VI, VII and VIII, on 6-26-86,

was made final and appealable. With respect to this order a timely notice of appeal was filed on 8-9-88.

The judgment of the Appellate Court of Illinois, First Judicial District, Fourth Division entered on June 22, 1989 affirmed the judgment of the trial court (Appendix p. 1a). The Supreme Court of Illinois denied Plaintiffs-Petitioners' Petition for Leave to Appeal on October 5, 1989 (Appendix p. 4a).

On November 21, 1989 the Supreme Court of Illinois denied Plaintiffs-Petitioners Motion for Leave to File a Motion for Reconsideration of the Order Denying Petition for Leave to Appeal and granted the motion of petitioners to stay the mandate of the Supreme Court of Illinois pending application for *certiorari* in the United States Supreme Court (Appendix pp. 8a-10a).

## ARGUMENT

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### **DOES THE ILLINOIS DRAM SHOP ACT VIOLATE THE UNITED STATES AND ILLINOIS CONSTITUTIONS BY PRECLUDING RECOVERY FOR THE LOSS OF LOVE, SOCIETY AND COMPANIONSHIP OF A SPOUSE WHOSE DEATH IS CAUSED BY OVER-SERVING ALCOHOL TO A DRUNK DRIVER, WHERE SUCH RECOVERY IS PERMITTED UNDER ILLINOIS COMMON LAW FOR THE OTHERWISE WRONGFUL DEATH OF A SPOUSE.**

In 1961, the Illinois Supreme Court voluntarily refrained from imposing liability on purveyors of alcohol to drunk drivers. *Cunningham v. Brown*, 22 Ill.2d 23, 30, 174 N.E. 2d 153, 156-157 (1961).

The supreme court in *Cunningham* recognized that non-liability for over-serving drunk drivers was a judicially created doctrine. The court took the position that there

was no need to overturn the old judge made law and recognize a "common law dram shop action" because the General Assembly, in 1961, had enacted an adequate statutory remedy, which corrected the evils arising from over-serving drunk drivers. *Cunningham, supra*, 174 N.E.2d at 156-157. However, the disparity between recoverable damages under common law and the remedy provided by the Dram Shop statute has grown too wide in the 29 years since *Cunningham*.

For purposes of the case at bar, the Illinois Dram Shop act places a \$20,000 cap on total damages for the death of a human being. Ill. Rev. Stat. ch. 43, para. 135 (1983). The erosion of the value of the \$20,000 cap on damages for the death of a human being, coupled with the preclusion of other elements of damage from this statutory remedy, make it almost meaningless. The Illinois legislature increased the \$20,000 cap to \$40,000 for injuries and deaths occurring after 9-12-85. Ch. 43, para. 135, Ill. Rev. Stat. (amend. 1-1-86). This amendment did not, however, expand the recoverable elements of damages.

Because of inflation the value of the \$20,000 cap on damages and the decisions precluding recovery for loss of love, society, and companionship keep compensation under the Dram Shop statute so low that it actually defeats the announced policy of deterrence which lays behind this statute. Ill. Rev. Stat. Ch. 43, para. 94 (1983). (An excellent discussion of the impact of inflation in recent years is the "Brief of the Chicago Bar Association Amicus Curiae in the Federal Judicial Salary Litigation," Sept.-Oct. 1980, *Chicago Bar Record* 60 and John J. Kennelly, "Inflation: Admissibility of Proof. . ." 32 Trial Lawyers Guild 174 (1988)).

The problem of over-serving is, now, actually compounded by the Illinois Dram Shop statute, because the statute as

interpreted by Illinois courts, effectively grants immunity to purveyors and servers of alcohol. The damages are capped at such a low amount that they are "de minimus", and the damages element does not include society, which today, has been recognized as the most important component of loss in a death case. *Bullard v. Barnes*, 102 Ill.2d 505, 468 N.E.2d 1228 (1984).

The combination of Illinois' strict judicial interpretation of this statute, and the ongoing development of Illinois' common law of damages, have now coalesced to destroy any parity of recovery between the Dram Shop statute and the common law.

In the case at bar, the trial court granted summary judgment on Count V which sought recovery for loss of love, society, and companionship under the Dram Shop act because the trial court interpreted the Dram Shop act to preclude compensation for these damages. The trial court also dismissed Counts VI, VII, and VIII which plead "common law dram shop actions" seeking recovery of love, society and companionship. It relied on the Appellate Court authority. *Wilberton v. Freddie's Pepper Box, Inc.*, 148 Ill.App.3d 319, 499 N.E.2d 615 (1st Dist., 1986); *Farmers Stand Bank & Trust Co. v. Lahey's Lounge*, 165 Ill.App.3d 473, 519 N.E.2d 121 (4th Dist., 1988). However, the interpretation of the Appellate Courts in these two cases is contrary to the announced public policy incorporated in the common law of this state, and many other states to compensate the survivors of a decedent for their loss of love, society and companionship. *Bullard v. Barnes*, 102 Ill.2d 505, 468 N.E.2d 1228 (1984); *Elliot v. Willis*, 92 Ill.2d 530, 442 N.E.2d 163 (1982).

A statute should not be construed so as to make it unconstitutional. *Harris v. Manor Health Corp.*, 111 Ill.2d 350, 363, 489 N.E.2d 1374, 1379 (1986).

Illinois statutes should be liberally interpreted.

All *general* provisions, terms, *phrases*, and expressions shall be *liberally construed* in order that the true *intent* and the *meaning* of the General Assembly may be *fully carried out*. Ill. Rev. Stat. ch. 1, para. 1004 (1983). (Emphasis added).

When read together, the unlawful sale (ch. 43, para. 131) and the damages (ch. 43, para. 135) provisions of the Illinois Dram Shop act would seem to require the interpretation that the act includes compensation for the loss of the love, society, companionship, and affection of the deceased; that would promote the announced legislative goals of "safety" and "welfare" of the people of Illinois by deterring tavern operators from negligently "distributing" alcohol to intoxicated customers, whom they know will drive. In *Weiner v. Trassatti*, 19 Ill.App.3d 240, 246-247, 311 N.E.2d 313, 319 (1st Dist. 1974) this court, following a liberal interpretation of the Dram Shop act, said that "consortium" was an element of damages under the Dram Shop act.

However, if no common law remedy exists, and if the respondents' interpretation of Ill. Rev. Stat. ch. 43, para. 135 (1983) is followed, the Illinois and Federal Constitutional prohibitions against Special Legislation, denial of Equal Protection, denial of Due Process, denial of the Right to a Remedy, and denial of the Right to a Jury Trial will be violated. This argument was advanced in the trial court.

The denial of Equal Protection, is involved because if families may recover for the loss of the love, society and companionship of their deceased loved ones as damages against other wrongdoers, but not against alcohol distributors, the families of the victims of those who over-serve drunk drivers are being discriminated against for no rational reason. And the tavern operators and their insurers are benefitting from an unfair, irrational classification.

Ill. Rev. Stat. ch. 43, para. 135 (1983) also violates the guarantees of Equal Protection under the Fourteenth Amendment of the United States Constitution, and Illinois Constitution, Art. I, sec. 2 (1970), because it unreasonably and arbitrarily distinguishes the class of consumers and taxpayers who are harmed by the negligence of those distributing and selling alcohol, from the class of those consumers and taxpayers harmed by all other types of commercial activity in Illinois. Negligence in selling or distributing manufactured goods, medical services, and electricity allows a remedy to the class of persons, or consumers, injured therefrom. The class of taxpayers and consumers injured by the distribution of alcohol are deprived of such a remedy for no good or rational reason.

The Supreme Court of New Mexico clearly recognized this inequity when it struck down the \$50,000 damages cap in that state's Dram Shop act, on grounds that it unconstitutionally violated the federal and state guarantees of Equal Protection. *Richardson v. Carnegie Library Restaurant, Inc.*, 783 P.2d 1153 (N.M. 1988). The supreme court further held that the damages cap also violated the Right to Trial by Jury guaranteed by Article II, Section 12 of the New Mexico Constitution. *Id.*

In 1972 the Illinois Supreme Court found that Art. IV, sec. 13, Ill. Const. (1970) prohibiting Special Legislation was violated where a cause of action for a personal injury was destroyed by the newly enacted "no-fault legislation". *Grace v. Howlett*, 51 Ill.2d 478, 283 N.E.2d 474, 478-480 (1972). When discussing infringements of plaintiff's right to Equal Protection, and the guarantee against Special Legislation, the *Grace* Court said:

Article IV, sec. 13 has *increased* judicial *responsibility* for determining whether a general law is or can be made applicable." 283 N.E.2d 474, 479 (1972). (Emphasis added).

When the damages limitations of ch. 43, para. 135 are reviewed in light of this interpretation of the 1970 constitution another defect in this legislation appears. It also creates a special class of commercial purveyors shielded from the common law tort remedy of monetary damages assessed by jurors. This special class is composed of commercial, retail and tavern vendors. In Illinois they are the only commercial vendors of food or beverage protected by such legislation; and, again, without reason. The announced purpose of the Dram statute is to protect the people not the industry. Ill. Rev. Stat. ch. 43, para. 94 (1983). As it is now interpreted it actually protects the alcohol distribution industry. Nonuniformity of application of a statute is a denial of Equal Protection. *Brown v. Merlo*, 506 P.2d 212, 106 Cal. Rptr. 388 (Calif. Supt. Ct., 1973); *Skinner v. Anderson*, 38 Ill.2d 455, 231 N.E.2d 588 (1967).

Classification based on wealth is also a sin of this act, as interpreted by the trial court. Those whose family members are employed are the only ones to be compensated under ch. 43, para. 135 if their family member is killed. Therefore, the husband of the working wife recovers, where the husband of a housewife does not. No rationale for this distinction has been advanced.

In *Moran v. Beyer*, 734 F.2d 1245 (7th Cir., 1984) no rational reason was found to justify Illinois treating married women differently than unmarried women. Therefore, the Seventh Circuit found that the Illinois Spousal Immunity Statute, as interpreted by Illinois courts, violated the Equal Protection guarantees of both the Federal and the Illinois Constitution. In the case at bar the discrimination against families of non-working persons is equally irrational.

In the case of *Malan v. Lewis*, 693 P.2d 661 (Utah Sup. Ct., Dec., 1984), when the original purposes of the Idaho Guest Act were no longer accomplished by that statute, it was found to violate the Equal Protection clause of that state's constitution. No rational reason was found to justify treating passengers differently than other persons in that case. Similarly, in this case no rational reason exists for discriminating against the next of kin of a decedent who was not working.

The "heightened scrutiny test" was used to examine a statute of repose and a statute abolishing the collateral source doctrine by two respected state supreme courts. They recently struck down legislation which infringed on the two basic fundamental state constitutional rights of a "right to a remedy" and a "right to a jury." *Carson v. Mauer*, 120 N.H. 925, 424 A.2d 825, (N.H. Sup. Ct., 1984); *Farley v. Engle*, 740 P.2d 1058 (Kan. Sup. Ct., 1987).

The cap on recovery created by para. 135, and the interpretation of this statute to exclude the families of non-workers killed by drunk drivers from recovering for their loss of society are just as egregious a violation of these two fundamental rights as the legislation in *Carson* and *Farley*, and therefore, a violation of the Illinois and Federal equal protection provisions. In the case at bar, there is no rationale articulated in the statute, or in the case law, for protecting and treating purveyors or distributors of alcohol differently than a car dealer, who distributes a defective Pinto; a restauranteur, who sells bad pizza; a physician, who prescribes drugs for a patient knowing of the ill effects on his driving ability; a bus driver, who runs a red light; or Commonwealth Edison, which fails to properly guard its high-powered generator. The announced purpose of the Dram Shop act is to protect the

people. Ill. Rev. Stat. ch. 43, para. 94. But if fair, compensatory damages are not recoverable then neither of the announced policies of deterrence, or compensation, are fulfilled by this statute.

Furthermore, the \$20,000 damages cap of this legislation (Ill. Rev. Stat. ch. 43, para. 135) has no logical basis for limiting total recovery for the death of a human being to that parsimonious amount. In *Wright v. Central DuPage Hospital Association*, 63 Ill.2d 313, 347 N.E.2d 736, 743 (1976) the Illinois Supreme Court found that a \$500,000 cap on damages for medical malpractice victims violated provisions regarding special legislation, Art. IV, sec. 13, Ill. Const. (1970). The same reasoning applies here. In *McGuire v. C & L Restaurant, Inc.*, 346 N.W.2d 605 (Minn. Sup. Ct., 1984) a statute imposing a damage cap of \$250,000 on actions against intoxicating liquor vendors, but not on actions against sellers of 3-2 beer, violated equal protection guarantees.

In addition, the "right to a remedy" is a separate right created by the Illinois Constitution, Art. I, sec. 12, (1970). It must be given more than lip service, if it is incorporated into a state constitution ratified as recently as 1970. It is wrong to interpret this fundamental right as a "mere glittering generality." *Kansas Malpractice Victims v. Bell*, 757 P.2d 251, 257 (Kan. Sup. Ct., 1988). It cannot be blithely ignored by the courts on the pretext that is a generalized policy statement. Other states do not interpret their "right to a remedy" constitutional provisions lightly, and the "right to a remedy" is an important, viable right that cannot be trampled by judicial interpretations which preclude all recovery. *Kansas Malpractice Victims v. Bell*, 757 P.2d 251, 259, 264 (Kan. Sup. Ct., 1988); *Hardy v. Ver Meulen*, 512 N.E.2d 626, (Ohio Sup. Ct., 1987); *Kennedy v. Cumberland*, 471 A.2d 195 (R.I., 1984);

*Berry v. Beech Aircraft*, 717 P.2d 670 (Utah Sup. Ct., 1985); *Oien v. City of Sioux Falls*, 393 N.W.2d 286 (S.D., 1986); *Smith v. Dept. of Ins.*, 507 So.2d 1080 (Fl. Sup. Ct., 1987). The "right to a remedy" in a state constitution is a fundamental right protected by the Equal Protection Clause of the state constitution and the federal constitution. *White v. Montana*, 661 P.2d 1272 (Mont. Sup. Ct., 1983).

In addition, the "right to a jury trial" provided and protected by the Illinois Constitution of 1970, Art. I, sec. 13, and Illinois statutes, Ill. Rev. Stat. ch. 78, para. 21 (1983) and the Federal Constitution, Seventh Amendment, itself is violated by the trial court's interpretation of this statute at the case at bar. As the Kansas Supreme Court recently pointed out, infringement on the right of a jury to set civil damages was an abridgement of the right of the citizens of Kansas under their state constitution, particularly where no appropriate alternate remedy was provided. *Kansas Malpractice Victims v. Bell*, 757 P.2d 251, 259-260 (Kan. Sup. Ct., 1988).

The right to have a jury decide common law damages is seriously limited by the legislation in the case bar because it precludes companionship and it caps damages at such a low level as to make it an immunity; that infringes on the State, and even the Federal right to jury trial. This Federal Constitutional Right is protected against infringement by the states, because it is incorporated into the Bill of Rights by the 14th Amendment and is enforceable against the states. *Boyd v. Bulala*, 647 F. Supp 781 (W.D. Va., 1986); *Awa v. Guam Mem. Hosp.*, 726 F.2d 594 (9th Cir., 1984); *Smith v. Barclay*, 429 A.2d 438 (Pa. Sup. Ct., 1981).

The present Illinois Dram Shop act, as interpreted by the defendant in the case at bar, also violates the right

to Due Process under the Fourteenth Amendment of the United States Constitution, as well as Article 1, Section 2 of the Illinois Constitution. The placement of impossible conditions, and unreasonable limitations, upon a cause of action, and removing the key element of monetary damages in a death case, society, from the jury's province creates a "Catch-22" situation. A remedy is ostensibly created; and then it is so limited that it becomes worthless: that is a violation of the Due Process protections of both state and federal constitutions. *Nelson v. Krusen*, 678 S.W.2d 918 (Texas Sup. Ct., 1984); *Barrio v. Magna*, 692 P.2d 280 (Ariz. Sup. Ct., 1984); *Ontiveros v. Borak*, 136 Ariz. 500, 667 P.2d 220 (1983); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. Sup. Ct., 1978). Through a series of decisions by the Illinois Courts, the Illinois Dram Shop statute has been turned into a device which deprives Illinois citizens of due process.

For example, there is a one year statute of limitations that is so strictly construed that it bars recovery by minors and other incapacitated plaintiffs after one year without any showing of a rational purpose behind this extra short time bar. *Demchuck v. DuPlanich*, 92 Ill.2d 1, 440 N.E.2d 112 (1982). It limits recovery to \$20,000, or \$40,000, depending on the year, in contrast to no cap for personal injury or wrongful death under Illinois common law. *Mulhern v. Talk of the Town*, 138 Ill.App.3d 829, 486 N.E.2d 383 (2nd Dist., 1985). Recovery under this statute is limited to the *total* recovery from *all* defendants combining for the statutory limit. *Darguzas v. Robinson*, 162 Ill.App.3d 362, 515 N.E.2d 451 (2nd Dist., 1987). Complete defenses, which completely bar recovery, unlike the principle of comparative fault now utilized at common law, are provided under this statute; those defenses are complicity and provocation. *Nelson v. Araiza*, 69 Ill.2d

534, 372 N.E.2d 637 (1977); *Akin v. J.R.'s*, 158 Ill.App.3d 834, 512 N.E.2d 130 (3rd Dist., 1987). There is no recovery of contribution against dram shops by co-defendants. *Hopkins v. Powers*, 136 Ill.App.3d 501, 483 N.E.2d 637 (3rd Dist., 1985); *JoDelis v. Harris*, 118 Ill.2d 482, 517 N.E.2d 1055 (1987). The right to recover under this statute is limited to commercial purveyor and retailers and provides absolutely no remedy against the social or business hosts, no matter how egregious their conduct. *Zamiar v. Linderman*, 132 Ill.App.3d 886, 478 N.E.2d 534 (1st Dist., 1985).

Most importantly for the case at bar, is the ruling that, now, there is no compensation for the love, society, and companionship for the death of a non-working loving wife, child or parent under this statute; according to the First Appellate District, First Division, and the Fourth Appellate District, and the trial court in this case. *Wilberton v. Freddie's Pepper Box, Inc.*, 148 Ill.App.3d 319, 499 N.E.2d 615 (1st Dist., 1986); *Farmers Stand Bank & Trust Co. v. Lahey's Lounge*, 165 Ill.App.3d 473, 519 N.E.2d 121 (4th Dist., 1988). This is directly contrary to the policy of the common law of this state, and many other states in the Union, to compensate the survivors for this element of damage. *Bullard v. Barnes*, 102 Ill.2d 505, 468 N.E.2d 1228 (1984); *Elliot v. Willis*, 92 Ill.2d 530, 442 N.E.2d 163 (1982). No recovery for emotional damage is allowed under this statute. *Engel v. Lamplighter*, 172 Ill.App.3d 59, 526 N.E.2d 641 (3rd Dist., 1988). Against this background or web of interpretations, the decision to bar recovery for loss of companionship creates a deprivation of plaintiff's constitutional rights.

Another consideration is that the sections of the Dram Shop act are dissoluble. Ch. 43, para. 193, "Partial Invalidation" Ill. Rev. Stat. (1953). Therefore, ch. 43, para. 135, can be found unconstitutional, in whole, or in part.

It is particularly, and only, the limitations on the damages, i.e., the remedy provisions of paragraph 135 that are under attack in this case. Ch. 43, para. 94 and para. 131, and the portions of para. 135 creating liability may still be left standing thereby creating a statutory duty, a standard of care, and a legislative recognition of a causal connection between over-serving and drunk driving. If the interpretations and limits on fair recovery imposed in para. 135 are eliminated as unconstitutional, then Illinois courts may fashion an appropriate common law remedy. This is similar to the approach utilized by the Michigan Supreme Court to modernize its dram shop law. *Longstreth v. Gensel*, 423 Mich. 675, 377 N.W.2d 804, 813 (Sup. Ct. Mich., 1985).

## CONCLUSION

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According to the court below, as Illinois Law now stands, there is no vehicle for gaining compensation for the loss of the love, society, and companionship of a decedent killed by a drunk driver against the tavern that overserved the drunk. The damages limitation of the Illinois Dram Shop act, and the restricted interpretations given it by Illinois courts, are constitutionally repugnant in light of the fact that Illinois Law provides for the recovery of the loss of love, society, and companionship for other types of wrongful death. In this context, the Dram Shop act violates fundamental rights guaranteed in both the Illinois and Federal Constitutions, as stated above.

The failure of Illinois to remedy these violations, either by legislative or judicial process, necessitates that this

Court act to protect the constitutional rights of Illinois citizens who are injured or killed as a result of the over-serving of alcohol. More specifically, this Court should invalidate the limitations of remedy under the Dram Shop statute.

A decision of this Court to strike down the limited damages provision of the Dram Shop act, as it existed in 1984, will require that the Illinois legislature and courts enact and enforce constitutional dram shop legislation. Such a decision will also serve to warn tavern owners and social providers of alcohol, foster deterrents and help to reduce the menace of drunk driving.

For the foregoing reasons, petitioners, DONALD BAUM, Individually, and as Executor of the Estate of BEVERLY BAUM, Deceased, and LESLIE B. BUENROSTRO, and DEBORAH B. SMITH, Individually, respectfully request this Court to allow their Petition for Writ of Certiorari so that the judgment of the Illinois Appellate Court may be reviewed and reversed.

Respectfully submitted,

GEORGE M. ELSENER  
Counsel of Record  
GEORGE M. ELSENER & ASSOCIATES  
180 North LaSalle Street  
Suite 1125  
Chicago, Illinois 60601-2601  
(312) 726-8125

*Attorneys for Petitioners*

January 20, 1990

# **APPENDIX**



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## APPENDIX 1

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Nos. 1-88-1741 & 1-88-2477  
(Consolidated)

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT  
FOURTH DIVISION  
June 22, 1989

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DONALD BAUM, Individually, and as Executor of the Estate  
of BEVERLY BAUM, Deceased, *et al.*,

*Plaintiffs-Appellants,*

v.

JOHN B. EGAN and MARY EGAN,

*Defendants-Appellees.*

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Appeal from the Circuit Court of Cook County.

No. 84 L 8481

Honorable Willard J. Lassers, Judge Presiding.

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## ORDER

According to the complaint, Beverly Baum was killed when the automobile she was driving collided with a vehicle driven by Daniel Liston, who was intoxicated. The defendants John B. Egan and Mary Egan owned, managed,

maintained and controlled a building and tavern where John Egan or one of his agents sold or gave Liston intoxicating liquor. One count of the complaint was filed under the Illinois Dram Shop Act (Ill. Rev. Stat. 1987, ch. 43, par. 135) for loss of love, society and companionship as a "loss to means of support." That count of the complaint admitted that the beneficial plaintiffs, the decedent's husband and two daughters, were not dependent on the decedent for support. The trial court entered summary judgment on that count in favor of the Egans.

Three counts of the complaint pleaded a common law action for damages caused by the negligent sale of intoxicating liquors. One count was based on wrongful death, another on the Survival Act, and the third alleged wilful and wanton conduct in connection with both the wrongful death and Survival Act actions. The trial court dismissed these three counts of the complaint.

First, considering the three counts based on an alleged common law action for the negligent sale of alcoholic beverages, the Illinois Supreme Court in *Cunningham v. Brown* (1961), 22 Ill. 2d 23, 174 N.E.2d 153, stated unequivocally that the Dram Shop Act provides the only remedy against tavern operators and owners. This court does not have the power to overrule the supreme court where it has spoken on the exact issue. *Rickey v. Chicago Transit Authority* (1983), 98 Ill. 2d 546, 457 N.E.2d 1.

The second issue concerns the dismissal of the Dram Shop Act count under a theory of loss of means of support based on allegations of loss of love, society and companionship. It is well settled that loss of means of support under the Dram Shop Act does not encompass these items of recovery. (*Farmers State Bank & Trust Co. v. Lahey's Lounge, Inc.* (1988), 165 Ill. App. 3d 473, 519

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N.E.2d 121; *Wilberton v. Freddie's Pepper Box, Inc.* (1986), 148 Ill. App. 3d 319, 499 N.E.2d 615.) The plaintiffs also allege that the statute is unconstitutional. A similar argument was made and rejected in the case of *Mulhern v. Talk of the Town* (1985), 138 Ill. App. 3d 829, 486 N.E.2d 383. We agree with the reasoning expressed in *Mulhern*.

For the above reasons, the judgments of the trial court are affirmed.

Affirmed.

JIGANTI, P.J., with JOHNSON and LINN, JJ., concurring.

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## **APPENDIX 2**

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ILLINOIS SUPREME COURT  
JULEANN HORNYAK, CLERK  
Supreme Court Building  
Springfield, Ill. 62706  
(217) 782-2035

October 5, 1989

Mr. George M. Elsener  
George M. Elsener & Associates  
180 N. LaSalle St., S#1125  
Chicago, IL 60601

No. 68921—Donald Baum, Indv., etc., et al., petitioners,  
v. John B. Egan, et al., respondents. Leave  
to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for  
leave to appeal in the above entitled cause.

The mandate of this Court will issue on October 27,  
1989.

## APPENDIX 3

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NO. 68921  
IN THE  
SUPREME COURT OF ILLINOIS

---

DONALD BAUM, Individually, and as Executor of the Estate of BEVERLY BAUM, Deceased, and LESLIE B. BUENROSTRO, and DEBORAH B. SMITH, Individually,

*Plaintiffs-Petitioners,*

v.

JOHN B. EGAN and MARY EGAN,

*Defendants-Respondents.*

---

The Appellate Court of Illinois First District  
No. 1-88-1741 & 1-88-2477 (Consolidated).

The Circuit Court of Cook County, Illinois  
No. 84 L 8481

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### PLAINTIFFS-PETITIONERS' MOTION FOR LEAVE TO FILE A MOTION FOR RECONSIDERATION OF THE ORDER DENYING PETITION FOR LEAVE TO APPEAL

Plaintiffs-Petitioners, DONALD BAUM, Individually, and as Executor of the Estate of BEVERLY BAUM, Deceased, and LESLIE B. BUENROSTRO, and DEBORAH B. SMITH, Individually, by their attorneys, move

the Court under the Supreme Court of Illinois Rule 368(c) to stay the mandate of this Court. In support, Plaintiffs-Petitioners state:

1. On October 5, 1989, the Court denied Plaintiffs-Petitioners' appeal and affirmed the Appellate Court.

2. Unless the time for issuance of the mandate of the court is enlarged by order, the mandate will be issued on October 27, 1989.

3. The case of *Stevens v. Ayers*, Petition for Leave to Appeal filed in this Court on 9-5-89, pending under Supreme Court No. 69184, deals with the same issues as presented by Plaintiffs-Petitioners in the case at bar. Plaintiffs respectfully suggest that this Court stay the mandate in *Baum v. Egan* because a decision has not been rendered in *Stevens v. Ayers*. And, if *Stevens* is granted, it would be contradictory to *Baum v. Egan*.

4. Plaintiffs-Petitioners' brief to this Court raised important federal constitutional issues which merit a review by this Court.

5. Plaintiffs-Petitioners' counsel will file a motion for reconsideration of the order denying his petition for leave to appeal because of *Richardson v. Carnegie Library Restaurant, Inc.*, 763 P.2d 1153 (N.M. 1988) and if it is denied, a petition for certiorari in the United States Supreme Court will be filed and this is not merely a tactic for delay.

6. Staying the mandate will conserve judicial resources and not prejudice any party.

WHEREFORE, Plaintiffs-Petitioners respectfully request that the Court stay the mandate pending their application for a writ of certiorari to the United States Supreme Court.

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DONALD BAUM, Individually,  
and as Executor of the Estate  
of BEVERLY BAUM, Deceased, and  
LESLIE B. BUENROSTRO, and  
DEBORAH B. SMITH, Individually,

By: /s/ George M. Elsener  
GEORGE M. ELSENER  
Plaintiffs-Petitioners attorney

STATE OF ILLINOIS  
COUNTY OF COOK-SS.

VERIFICATION

GEORGE M. ELSENER, being first duly sworn upon his oath, deposes and states that he has read the above and foregoing Plaintiffs-Petitioners' Motion for Stay of Mandate Pending Application for Certiorari by him subscribed. That he knows the contents thereof and that the same are true.

/s/ George M. Elsener  
GEORGE M. ELSENER

[Notice of Filing and Proof of Service by Delivery omitted in printing.]

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## APPENDIX 4

STATE OF ILLINOIS  
SUPREME COURT CLERK  
Supreme Court Building  
Springfield 62706

JULEANN HORNYAK	FIRST DISTRICT OFFICE
Clerk of the Court	Room 30-129
(217) 782-2035	Richard J. Daley Center
	Chicago 60602
	(312) 793-1332

November 21, 1989

Mr. George M. Elsener  
Attorney at Law  
180 North LaSalle St., S#1125  
Chicago, IL 60601-2601

THE COURT HAS TODAY ENTERED THE  
FOLLOWING ORDER IN THE CASE OF:

No. 68921—Donald Baum, Indv., etc., et al., petitioners,  
v. John B. Egan, et al., respondents.

The motion by petitioners for leave to file a motion for reconsideration of the order denying petition for leave to appeal is *denied*. The request for stay of mandate pending the filing and disposition of a petition for writ of certiorari is *allowed*.

Standard order form enclosed.

JH/hc

cc: Baal, O'Connor & Martin  
Bresler, Brenner & Moltzen

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## APPENDIX 5

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No. 68921  
IN THE  
SUPREME COURT OF ILLINOIS

---

Donald Baum, Indv., etc., et al.,

*Petitioners,*

v.

John B. Egan, et al.,

*Respondents.*

---

Appeal from the Appellate Court  
First District—AC1-88-1741

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### ORDER

This matter has come for consideration upon the motion of petitioners to stay the mandate of this Court pending appeal or application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed pending the filing of a notice of appeal or an application for *certiorari* or the expiration of the period within which said application or notice may be filed. If *certiorari* is applied for or notice of appeal filed, the mandate of this Court shall, upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the

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United States Supreme Court of such application or appeal. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or *certiorari* may be sought.

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